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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TRACY LEWIN et al., Plaintiffs and Respondents, v. WELK RESORT GROUP, INC. et al., Defendants and Appellants.	D073774 (Super. Ct. No. 37-2017-00031748-CU-CO-CTL)

APPEAL from an order of the Superior Court of San Diego County, John S. Meyer, Judge. Affirmed.

Goodwin Procter and David J. Zimmer, Brooks R. Brown, William M. Jay; Welk Resort Group, Inc. and Ronald E. Naves, Jr.; Godes & Preis and James N. Godes, Joshua R. Mino, for Defendants and Appellants.

Law Offices of W. Lee Biddle and William Lee Biddle; US Consumer Attorneys for Plaintiffs and Respondents.

Defendants Welk Resort Group, Inc. and Welk Resorts Platinum Owners Association (Welk) appeal an order denying Welk's petition to compel arbitration of an action filed by Plaintiffs Tracy Lewin and Anthony Manzo against Welk. Plaintiffs purchased an interest in Welk's vacation timeshare program and allegedly defaulted on their monthly installment payments related to the timeshare purchase. Plaintiffs filed a single cause of action in superior court, seeking declaratory relief regarding the parties' rights and obligations under the timeshare purchase agreement.

Welk contends that this dispute belongs in arbitration pursuant to a provision in the timeshare purchase agreement requiring the parties to submit all claims arising out of the agreement to a "dispute or claim resolution process" overseen by a "neutral or impartial person" and governed by "reasonable and fair" rules and procedures. In denying Welk's petition to compel arbitration, the trial court concluded that the parties' dispute resolution provision lacks several attributes of a "true arbitration agreement" and therefore, does not constitute an express agreement to arbitrate. The trial court also rejected Welk's argument that Plaintiffs consented to arbitrate their disputes with Welk because they participated, to a limited extent, in a separate arbitration proceeding that Welk had initiated against them. As the trial court explained, Plaintiffs "consistently objected" to the arbitration that Welk had filed against them.

We agree with the trial court on both issues. Accordingly, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Timeshare Purchase Agreement*

Welk is the owner and operator of a vacation timeshare program for properties in California, Missouri, and Mexico. In exchange for free tickets to a local attraction, Plaintiffs agreed to attend a presentation during which Welk attempted to sell them interests in its timeshare program. According to Plaintiffs, Welk engaged in a "choreographed, high pressure and relentless sale[s] pitch" that lasted "several exhausting hours" and culminated with a take-it-or-leave-it offer that expired that day.

At the end of the presentation, Plaintiffs executed a nine-page purchase and sale agreement (Agreement) to buy an interest in Welk's timeshare program. Plaintiffs financed the purchase through Welk by executing a promissory note and security agreement in favor of Welk. The Agreement allowed Plaintiffs to cancel with no penalty or obligation within seven days of acceptance, but Plaintiffs did not do so.

Paragraph 13 of the Agreement contains a dispute resolution provision (Dispute Resolution Provision) that provides, in full, as follows:

> 13. DISPUTE RESOLUTION. The parties agree that any dispute between the parties arising out of this Agreement shall be subject to the following dispute resolution rules:
>
> (1) The Seller shall advance the fees necessary to initiate the dispute or claim resolution process, with the costs and fees, including ongoing costs and fees, if any, to be paid as agreed by the parties and if they cannot agree then the costs and fees are to be paid as determined by the person or persons presiding at the dispute or claim resolution proceeding or hearing.

(2) There shall be a neutral or impartial person to administer and preside over the claim or dispute resolution process.

(3) The parties shall appoint or select the person to administer and preside over the claim or dispute resolution process within no more than 60 days from initiation of the claim or dispute resolution process or hearing. The person appointed, selected, designated, or assigned to preside may be challenged for bias.

(4) The venue of the claim or dispute resolution process shall be San Diego County, California, unless the parties agree to some other location.

(5) The claim or dispute resolution process shall be promptly and timely commenced, which shall be by a date agreed upon by the parties, and if they cannot agree, a date shall be determined by the person presiding over the dispute resolution process.

(6) The claim or dispute resolution process to be [*sic*] conducted in accordance with rules and procedures that are reasonable and fair to the parties.

(7) The claim or dispute resolution process shall be promptly and timely concluded, including the issuance of any decision or ruling following the proceeding or hearing.

(8) The person presiding at the claim or dispute resolution process shall be authorized to provide all recognized remedies available in law or equity for any cause of action that is the basis of the proceeding or hearing. The parties may authorize the limitation or prohibition of punitive damages.[1]

One other provision of the Agreement is material to this appeal. Paragraph 12 (b) outlines the parties' rights and obligations if the buyer defaults before the close of escrow. It grants Welk a right to terminate the Agreement upon default by providing notice of termination, at which point the buyer may provide an objection notice disputing the determination of default. After outlining these rights and obligations, Paragraph 12 (b)

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[1] Most of the paragraphs in the Dispute Resolution Provision are not separated by spaces in the Agreement. However, we have added spaces between the paragraphs where necessary to make the Dispute Resolution Provision easier to read.

provides as follows: "In the event that Purchaser timely delivers to Escrow Holder the Objection Notice, the dispute regarding the disposition of Purchaser's funds deposited with Seller, and every other cause of action which has arisen between Seller and Purchaser under this Agreement shall be settled *by arbitration pursuant to Paragraph 13(b)*, below." (Italics added.)

2. *The Arbitration Proceedings*

Several years after Plaintiffs accepted the Agreement, Welk sent Plaintiffs a notice informing them that they had defaulted on their installment payments and Welk intended to accelerate the maturity date of the outstanding principal and accrued interest due under the note. Two weeks later, Welk filed an arbitration demand against Plaintiffs with Judicial Arbitration and Mediation Services, Inc. (JAMS), alleging that Plaintiffs' default had breached the Agreement. In its arbitration demand, Welk indicated that the arbitration was not a consumer arbitration. Under JAMS standards, a company that initiates arbitration against a consumer is required to pay all costs associated with the arbitration, whereas no analogous rule applies to non-consumer arbitrations.

Plaintiffs responded to Welk's arbitration demand by filing a letter with the JAMS case manager assigned to the matter, in which Plaintiffs "object[ed] to Welk's attempts to classify [the arbitration] as something other than a consumer transaction." Plaintiffs also objected to proceeding with the arbitration, as follows: "Because this is a relatively low value consumer transaction, Respondents cannot agree to enter into an arbitration where they may be responsible for a pro rata share of the substantial arbitration fees and expenses that may accrue during the case."

Shortly after writing this letter, Plaintiffs filed a general denial and counterclaims, accusing Welk of engaging in misstatements and omissions of material fact during its timeshare sales presentation. Plaintiffs also reiterated their objection to proceeding with the arbitration as constituted. The heading of Plaintiffs' filing, for instance, stated: "**OBJECTION TO PROCEEDING UNLESS THIS MATTER IS CLASSIFIED AS A CONSUMER ARBITRATION**." The filing also stated that Plaintiffs "object[ed] to proceeding with [the] arbitration until a finding is made by JAMS or a Court that [the] matter is covered by consumer arbitration rights, laws, and procedures." Further, Plaintiffs indicated that the "denial and counterclaim[s] [were] intended only to protect [Plaintiffs'] rights under JAMS rules and [were] not intended to waive any objection to proceeding with [the] matter if it [remained] classified as a non-consumer arbitration."

Approximately two weeks later, the JAMS case manager assigned to the matter informed the parties via letter that the consumer rules did not apply to the parties' dispute and all further inquiries pertaining to the designation of the arbitration should be directed to the arbitrator. That same day, the JAMS case manager informed the parties that an arbitrator (Hon. Joseph R. Brisco (Ret.)) had been appointed to the matter and sent each side a $2,500 bill to pay for the arbitrator's $5,000 retainer fee.

One month later, Plaintiffs filed a request with JAMS to reclassify the matter as a consumer arbitration. Plaintiffs did not dispute that the parties had accepted an agreement to arbitrate. However, they argued that any arbitration conducted under the commercial arbitration rules, rather than the consumer arbitration rules, would be unconscionable, as they would require Plaintiffs to expend "well over $5,000" and "10

times what they would pay in court." Plaintiffs further indicated that they "may have no choice but to seek an injunction and declaratory relief from Superior Court if [the arbitration] remain[ed] classified as a commercial arbitration." The JAMS case manager responded with a letter reaffirming JAMS's prior designation determination.

The following day, Plaintiffs sent the JAMS case manager another letter requesting the basis for JAMS's decision and the identity of the individual or entity responsible for making the determination. Plaintiffs informed the case manager that they had filed their denial and counterclaims solely "to preserve their rights and avoid any claim of default," but, "[f]rom the start of [the] matter," had objected to proceeding with a non-consumer arbitration. Plaintiffs again maintained that the costs of a non-consumer arbitration would render the arbitration "unconscionable."

In response, JAMS's general counsel sent a letter to the parties informing them that JAMS's National Arbitration Committee conducts an "administrative review" of arbitration demands to determine their consumer status. She advised the parties that any further analysis or determination must be undertaken by the arbitrator or a court. The general counsel acknowledged that Plaintiffs had "object[ed] to proceeding" and advised the parties that JAMS did not have the ability to compel any party to participate in arbitration or pay fees. Therefore, the general counsel requested clarification regarding whether Plaintiffs would pay their portion of the fees or whether Welk would advance the fees; if not, JAMS could not proceed with administration of the matter.

3. *The Superior Court Proceedings*

Rather than paying their pro rata portion of the retainer fee, Plaintiffs filed an action against Welk in superior court, seeking a declaration regarding the parties' rights and obligations under the Agreement. Specifically, Plaintiffs sought a declaration that they were consumers under applicable state laws and JAMS's policies. Any arbitration under an alternative designation, Plaintiffs claimed, would be unconscionable. Plaintiffs also sought an injunction prohibiting Welk from proceeding with the arbitration unless Welk classified the proceeding as a consumer arbitration.

Welk petitioned to compel arbitration of Plaintiffs' cause of action, arguing that Plaintiffs' lawsuit constituted a dispute arising out of the Agreement and, therefore, fell within the scope of the Dispute Resolution Provision. Welk contended that Plaintiffs had not previously disputed the existence of an agreement to arbitrate and, on the contrary, had "participated in the arbitration proceedings" by filing an answer and counterclaims, sending initial disclosures to Welk, and requesting determinations from JAMS regarding the applicable designation for the arbitration. Welk also argued that the Dispute Resolution Provision is not unconscionable because, according to Welk, it is "bilateral and mutual" and does "not impose unreasonable costs of arbitration on Plaintiffs."

Plaintiffs opposed. They disputed Welk's argument that they had consented to arbitration, arguing that they "consistently and fervently objected to proceeding in arbitration so long as [Plaintiffs] were not classified as consumers." Plaintiffs also disputed Welk's claim that the Dispute Resolution Provision required arbitration of all disputes, thus impliedly arguing that the Dispute Resolution Provision is not an

agreement to arbitrate. In particular, Plaintiffs argued that the Dispute Resolution Provision "could be read to allow [the] Court to resolve the entire matter or any part of it rather than requiring the exclusive and continuous use of an arbitration organization," given that it does not use the label "arbitration" or set forth the rules governing the dispute resolution process.

Alternatively, Plaintiffs claimed that the Dispute Resolution Provision is unconscionable. Plaintiffs contended that the Dispute Resolution Provision is procedurally unconscionable because it is contained in a "standard, pre-drafted contract" that Plaintiffs had no opportunity to negotiate. They claimed that it is substantively unconscionable because the cost of arbitration would be prohibitively expensive. Further, they argued that the Dispute Resolution Provision is substantively unconscionable because it allegedly lacks mutuality, requiring only Plaintiffs—not Welk—to arbitrate their claims.

The trial court denied Welk's petition to compel arbitration. Specifically, it concluded that Plaintiff did not consent to arbitration through their participation in Welk's arbitration because they "consistently objected to any arbitration if not classified as a consumer claim."

The court also concluded that the Dispute Resolution Provision is not an express agreement to arbitrate. The court noted that the Dispute Resolution Provision does not use the term "arbitration" and instead refers to "dispute resolution," which "includes mediation, settlement conferences, arbitration, etc." The court also found that the Dispute Resolution Provision does not provide for finality, a core attribute of a "true

arbitration agreement." Further, the court reasoned that the Dispute Resolution Provision does not provide Plaintiffs an opportunity to be heard, as it does not identify any applicable rules and procedures. Finally, the court found that Welk "unilaterally selected JAMS, and JAMS selected the person to preside over the process," depriving Plaintiff of another attribute of a "true arbitration"—the ability to select the decision maker. The court did not reach Plaintiffs' alternative unconscionability argument.

Because the court found that there is no express arbitration agreement and Plaintiffs did not consent to arbitration, it denied Welk's petition to compel arbitration.

II

DISCUSSION

1. *Legal Standards*

" 'The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract.' " (*City of Vista v. Sutro & Co.* (1997) 52 Cal.App.4th 401, 407.) "Whether the parties formed a valid agreement to arbitrate is determined under general California contract law." (*Ibid.*; see *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (*US*), *LLC* (2012) 55 Cal.4th 223, 236 (*Pinnacle*) ["In California, '[g]eneral principles of contract law determine whether the parties have entered a binding agreement to arbitrate.' "].)

The party seeking arbitration bears the burden of proving the existence of an arbitration agreement, and the opposing party bears the burden of proving any defense. (*Pinnacle, supra,* 55 Cal.4th at p. 236; *Nielsen Contracting, Inc. v. Applied Underwriters, Inc.* (2018) 22 Cal.App.5th 1096, 1106.) Where the evidence is not in conflict, we apply

de novo review to the denial of a petition to compel arbitration. (*Pinnacle*, at p. 236; *Serafin v. Balco Properties Ltd., LLC* (2015) 235 Cal.App.4th 165, 173.) However, "[i]f the trial court resolved contested facts, we 'review the court's factual determinations for substantial evidence.' " (*Nielsen*, at p. 1106.)

2. *Express Agreement to Arbitrate*

Welk contends that the trial court erred in denying its petition to compel arbitration because the Dispute Resolution Provision constitutes an express agreement to arbitrate disputes arising out of the Agreement, including the cause of action Plaintiffs have asserted in this litigation. According to Welk, the Dispute Resolution Provision includes all of "the basic requirements for an enforceable arbitration agreement," including a third-party decision maker, an opportunity for all parties to be heard, and a final and binding decision, and the trial court erred in finding to the contrary.

Plaintiffs, on the other hand, contend that the trial court properly denied Welk's petition to compel arbitration because the Dispute Resolution Provision is so "hopelessly vague" that its objective is unascertainable. Plaintiffs emphasize that the Dispute Resolution Provision does not identify "arbitration" as the chosen method of dispute resolution, define the "reasonable and fair" rules governing the process, or require the person presiding over the process to issue a final and binding decision. Therefore, Plaintiffs argue, Welk has not established the existence of an arbitration agreement.

For the following reasons, we agree with Plaintiffs.

a. *Uncertainty of the Contract*

"Contract formation requires mutual consent, which cannot exist unless the parties 'agree upon the same thing in the same sense.' [Citations.] 'If there is no evidence establishing a manifestation of assent to the "same thing" by both parties, then there is no mutual consent to contract and no contract formation.' [Citation.] 'Mutual consent is determined under an objective standard applied to the outward manifestations or

expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings.' " (*Bustamante v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 208 (*Bustamante*); see Civ. Code, § 1580.)

" 'Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable.' [Citations.] 'The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy.' [Citations.] But '[i]f . . . a supposed "contract" does not provide a basis for determining what obligations the parties have agreed to, and hence does not make possible a determination of whether those agreed obligations have been breached, there is no contract.' " (*Bustamante*, *supra*, 141 Cal.App.4th at p. 209; Civ. Code, §§ 1598, 3390.)

Applying these standards, we agree with Plaintiffs that the procedures set forth in the Dispute Resolution Provision are so vague and ambiguous as to be unascertainable and, therefore, unenforceable. As Plaintiffs note, the Dispute Resolution Provision does not use the terms "arbitration" or "arbitrator." Rather, it requires the parties to submit their disputes to an undefined "dispute resolution process." A "dispute resolution process" can take myriad forms, both judicial and nonjudicial, including civil litigation, negotiation, neutral factfinding, organizational ombudsman, voluntary or mandatory settlement conferences, mini-trial, private judging, early neutral evaluation, judicial arbitration, and contractual arbitration. (See Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2018) ¶ 1:2 CAADR Ch. 1-A.) In other words, arbitration is one *method* of dispute resolution, but the terms "arbitration"

and "dispute resolution" are "not interchangeable." (*Cheng-Canindin v. Renaissance Hotel Associates* (1996) 50 Cal.App.4th 676, 692 (*Cheng-Canindin*); see *Lindsay v. Lewandowki* (2006) 139 Cal.App.4th 1618, 1623 [settlement stipulation uncertain, in part, because it described a dispute resolution procedure both as "mediation" and "binding arbitration"].)

Standing alone, "the failure of the agreement to identify the grievance procedure as 'arbitration' is not fatal to its use as a binding mechanism for resolving disputes between the parties. [Citations.] [¶] More important is the nature and intended effect of the proceeding." (*Painters Dist. Council No. 33 v. Moen* (1982) 128 Cal.App.3d 1032, 1036 (*Painters*).) However, the nature and intended effect of the "dispute or claim resolution process" discussed in the Dispute Resolution Provision do not assist Welk in proving the existence of an agreement to arbitrate, as they are equally as vague as the undefined label "dispute or claim resolution process" (if not more so).

For instance, the Dispute Resolution Provision states only in general terms that the "process [shall] be conducted in accordance with rules and procedures that are reasonable and fair to the parties." But what are those rules? Arbitration rules? Mediation rules? Settlement conference rules? Something else? Who decides whether the rules are "reasonable and fair"? And what happens if the parties disagree as to the "reasonable and fair" rules that govern the proceeding? The Dispute Resolution Provision does not answer any of these questions. (*Flores v. Nature's Best Distribution* (2016) 7 Cal.App.5th 1, 10-11 [document was ambiguous and not an agreement to arbitrate, in part, because it did not identify the applicable arbitration rules].)

In fact, we have no basis from which to discern even the most fundamental aspects of the proceeding to which the parties have "agreed" to submit their disputes. The Dispute Resolution Provision merely provides that the parties must appoint or select a "neutral or impartial person" to "administer and preside over [a] claim or dispute resolution process." The Provision's circular reference to a "dispute resolution process" when purporting to *describe* the process brings us no closer to discerning the parties' intentions, rights, or obligations. (*Westside Sane/Freeze v. Ernest W. Hahn, Inc.* (1990) 224 Cal.App.3d 546, 558 [circular references are "indefinite" and "acutely ambiguous"].)

There are other aspects of the Dispute Resolution Provision that lead us to conclude that Welk has not established the existence of an enforceable arbitration agreement. "[A]lthough arbitration can take many procedural forms, a dispute resolution procedure is not an arbitration unless there is [1] a third party decision maker, [2] a *final and binding decision,* and [3] a mechanism to assure a minimum level of impartiality with respect to the rendering of that decision." (*Chening-Canindin, supra,* 50 Cal.App.4th at pp. 684-685 [italics added].) As the trial court correctly found, the Dispute Resolution Provision does not include at least one of these essential attributes of arbitration—namely, the issuance of a final and binding decision.[2] (*See American*

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2 We do not mean to suggest that an agreement must always state that the arbitrator will issue a "final and binding" award to constitute an enforceable agreement to arbitrate. On the contrary, the Supreme Court has suggested no such requirement exists. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 9 ["[I]t is the general rule that parties to a private arbitration impliedly agree that the arbitrator's decision will be both binding and final."].) However, where the agreement at issue is so vague that the procedure to which the parties have agreed is itself unascertainable, as it is here, the presence or absence of

Federation of State, County & Municipal Employees, Local 1902, AFL-CIO v. Metropolitan Water Dist. of Southern Cal. (2005) 126 Cal.App.4th 247, 259-260 [memorandum of understanding requiring disputes to be submitted to a neutral hearing officer for a purportedly "final and binding" decision, but permitted the officer's decision to be appealed, lacked finality and was not an enforceable agreement to arbitrate].)

Finally, the Dispute Resolution Provision does not inform the parties that they are waiving their constitutional rights to a jury trial by accepting the Provision. To be sure, an otherwise valid agreement to arbitrate will not be nullified merely because it lacks an express waiver of the parties' rights to a jury trial, as a jury waiver is implied by the very nature of an arbitration agreement. (*Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699, 713.) However, the presence or absence of an express jury trial waiver may be relevant in assessing whether an agreement to arbitrate exists in the first place. (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 569 [" 'Absent a clear agreement to submit disputes to arbitration, courts will not infer the right to a jury trial has been waived.' "]; see also *Esparza v. Sand & Sea, Inc.* (2016) 2 Cal.App.5th 781, 790.) Here, the Dispute Resolution Provision's silence on whether the parties are waiving their jury trial rights by accepting the Provision further undermines Welk's contention that the parties entered into an express agreement to arbitrate their disputes.

For all these reasons, the Dispute Resolution Provision—which does not refer to "arbitration" or an "arbitrator," mandate the issuance of a final and binding decision,

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language providing for a final and binding award may assist in determining whether an agreement to arbitrate exists.

identify the "reasonable and fair" rules applicable to the dispute resolution process, waive the parties' constitutional rights to a jury trial, or articulate the most basic aspects of the dispute resolution process—is uncertain, indefinite, and void. As such, it is not an enforceable agreement to arbitrate.[3]

b. *Welk's Arguments*

Welk asserts five main arguments in support of its claim that the Dispute Resolution Provision is an agreement to arbitrate. We address each argument in turn.

First, Welk argues that the Dispute Resolution Provision does in fact require the person administering and overseeing the "dispute resolution process" to issue a final and binding decision. Specifically, Welk cites the following italicized portion of the Dispute Resolution Provision: "The claim or dispute resolution process shall be promptly and timely concluded, *including the issuance of any decision or ruling following the proceeding or hearing*." (Italics added.) Contrary to Welk's argument, however, the

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[3] As noted, the trial court also found that the Dispute Resolution Provision is not an agreement to arbitrate because it found that, in practice, Welk "unilaterally selected JAMS, and JAMS selected the person to preside over the process," thus depriving Plaintiffs of any input on the third-party decisionmaker. (*Cheng-Canindin, supra*, 50 Cal.App.4th at p. 684 [arbitration agreement requires "a decision maker who is chosen by the parties"].) Welk responds that, irrespective of what occurred in practice, the Arbitration Provision itself expressly states that the "parties shall appoint or select the person to administer and preside over the claim or dispute resolution process." Welk also responds by alleging, without any citation to the appellate record, that Plaintiffs were involved in the selection of the arbitrator. (*Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 384 [appellate court may treat factual assertion as waived if appellant fails to support it with record citations].) Because the Dispute Resolution Provision is uncertain for the reasons discussed *ante*, we need not address whether the Provision is also inoperative due to Plaintiffs' alleged inability to choose a third-party decision maker.

provision on which Welk relies merely contemplates the *possibility* of a decision or ruling. It does not *mandate* any such decision or ruling. Further, it says nothing about the finality or binding effect of any such decision or ruling.[4] As noted *ante*, "it is essential that arbitration judgments be both binding and final." (*A.M. Classic Construction, Inc. v. Tri-Build Development Co.* (1999) 70 Cal.App.4th 1470, 1474.)

Second, Welk asserts that contracting parties have leeway to craft arbitration agreements in the manner of their own choosing, even if those agreements do not use the label "arbitration" or resemble "classic" arbitration agreements. Welk relies on four cases in which courts have enforced arbitration agreements, even though they either did not use the term "arbitration" or incorporate typical features of arbitration, and likens the Dispute Resolution Provision to the agreements in those cases. The cases on which Welk rely are readily distinguishable, however, and only further underscore the indefiniteness of the Dispute Resolution Provision and the lack of mutual consent in this case.

For instance, in *Silva v. Mercier* (1949) 33 Cal.2d 704, our Supreme Court was asked to determine whether the parties' collective bargaining agreement had been terminated. The court declined to address the matter, however, because a clause in the agreement mandated that the issue be resolved by a trade board. (*Id.* at pp. 708-709.)

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4 Welk contends the decision or ruling referenced in the Provision necessarily is final and binding; otherwise, the parties' dispute resolution process could never be "concluded." Welk is mistaken. Nonbinding decisions and rulings are commonplace features of many dispute resolution proceedings, including, for example, mini-trials, judicial arbitrations, and certain forms of judicial references. (Knight, Cal. Practice Guide: Alternative Dispute Resolution, *supra*, ¶ 3:199.6 CAADR Ch. 3(I)-F; *id.* at ¶ 4:35 CAADR Ch. 4-B; *id.* at ¶ 6:127 CAADR Ch. 6-C; Code Civ. Proc., § 644.)

The board's decisions were "final," and, in the event of a deadlock, matters were to be settled by a mediator and then an arbitrator. (*Id.* at p. 708.) The *Silva* court determined that the clause must be enforced, irrespective of whether the trade board was "technically a common law or statutory arbitration or something akin thereto," because the agreement "provide[d] for the determination by a third person or persons of [a] proper matter to be settled and that the decision shall be final . . . ." (*Ibid.*) Unlike the agreement in *Silva*, the Dispute Resolution Provision does not require a third-party neutral to render a final and binding decision. Thus, it is lacking the core element of arbitral finality that was present in the agreement considered in *Silva*.

Likewise, in *Painters*, *supra*, 128 Cal.App.3d 1032, the issue presented was whether a provision in a collective bargaining agreement constituted an agreement to arbitrate. The agreement contemplated that unresolved disputes between the parties would be heard before a joint adjustment board for "a final and binding determination," and, if the board failed to reach a decision, would be referred to a "neutral arbitrator" to "render a 'final and binding decision.' " (*Id.* at p. 1036.) The *Painters* court rejected the defendant's argument that this procedure was "not a 'real arbitration' " merely because it was not denominated an arbitration, instead concluding that the "board's decision was contemplated as a final ruling on the matter." (*Id.* at p. 1037.) Like the agreement in *Silva*, the agreement at issue in *Painters* required a neutral body to issue a final and binding decision, whereas the Dispute Resolution Provision does not.

Welk relies on *MacDonald v. San Diego State University* (1980) 111 Cal.App.3d 67, as well, in which we considered whether a process described in a university's faculty

grievance procedure was an arbitration subject to confirmation in superior court. We found that the process was an arbitration, even though it curtailed the type of evidence that could be presented, because arbitration "is subject to the agreement of the parties." (*Id.* at pp. 76-77.) Even so, however, we recognized that "[g]enerally it is necessary that arbitration clauses describe the arbitrator's decision as final." (*Id.* at p. 77.) As noted *ante*, the dispute resolution process in this case, unlike the arbitration process in *MacDonald*, does not encompass this core attribute of arbitration.

Welk's final case, *Bowers v. Raymond J. Lucia Companies, Inc.* (2012) 206 Cal.App.4th 724, is inapposite for similar reasons. In that case, the parties executed an agreement requiring them to participate in a mediation and, if it proved unsuccessful, the mediator had to choose between two "last and final demands" to be a "binding mediator judgment." (*Id.* at p. 731.) The parties called the procedure both "binding mediation" and a "mediation with a binding arbitration component following." (*Id.* at p. 729.) Our court rejected arguments that the agreement was uncertain and concluded that substantial evidence supported a finding of mutual consent. (*Id.* at pp. 732-736.) As we explained, the parties' description of the procedures that applied to the process, coupled with their actual participation in those procedures, gave rise to an enforceable agreement, even if the term "binding mediation" was uncertain when read in isolation. (*Id.* at pp. 733-734.) The *Bowers* agreement bears little resemblance to the Dispute Resolution Agreement. Unlike the *Bowers* agreement, the Dispute Resolution Agreement does not mandate a "binding" judgment, nor describe how the dispute resolution process is intended to

operate. On the contrary, as discussed *ante*, it sets forth ill-defined (or rather, undefined) parameters that are too uncertain to establish an enforceable arbitration agreement.

Third, Welk contends that the Dispute Resolution Provision is an agreement to arbitrate because it could serve no other purpose. We disagree. The Dispute Resolution Provision could just as easily describe processes other than arbitration. Take voluntary judicial reference, for instance. "In a judicial reference, a pending court action is sent to a referee for hearing, determination and a report back to the court." (*Treo v. Kettner Homeowners Assn. v. Superior Court* (2008) 166 Cal.App.4th 1055, 1061.) A general reference directs the referee to try all issues in the action and empowers the referee to make a binding determination that "must stand as the decision of the court." (Code Civ. Proc., § 644, subd. (a).) Alternatively, a special reference authorizes the referee to make advisory findings "necessary to enable the court to determine an action or proceeding." (Code Civ. Proc., § 638, subd. (b); *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1522.)

Each of the vague strictures set forth in the Dispute Resolution Provision is consistent with a judicial reference. For example, the Dispute Resolution Provision contemplates that a "neutral or impartial person" chosen by the parties will "administer and preside" over the process. With a judicial reference, the referee is "agreed upon by the parties." (Code Civ. Proc., § 640.) The Dispute Resolution Provision sets San Diego County as the venue, but permits the parties to select a different venue. Once again, this is consistent with a judicial reference, in which "[h]earings are usually held wherever the parties and referee agree upon." (Knight, Cal. Practice Guide: Alternative Dispute

Resolution, *supra*, ¶ 6:210 CAADR Ch. 6-C.) The Dispute Resolution Provision states that the dispute resolution process is to occur by a date agreed upon by the parties. With a voluntary judicial reference, the parties effectively dictate when the judicial reference begins because they must first file an agreement, stipulation, or motion requesting judicial reference. Finally, the Alternative Dispute Provision states that the parties shall agree on a division of costs and fees for the proceedings. The referee fees for a voluntary judicial reference are "agreed by the parties," too. (Code Civ. Proc., § 645.1, subd. (a).) As this illustrative example makes clear, there is no merit to Welk's claim that arbitration is the sole possible objective of the Dispute Resolution Provision.

Fourth, Welk claims that Paragraph 12 (b) of the Agreement—a provision located *outside* the Dispute Resolution Provision—demonstrates that the parties intended the Dispute Resolution Provision to be an arbitration agreement. Paragraph 12 (b), which applies only if the buyer of a timeshare interest defaults before the close of escrow, provides that disputes relating to such pre-closing defaults "shall be settled by arbitration pursuant to Paragraph 13 (b), below." As Plaintiffs correctly note, Paragraph 13 (b)—the paragraph referenced in Paragraph 12 (b)—does not exist. However, assuming this to be a mere clerical error, Paragraph 12 (b)'s fleeting reference to "arbitration" does not, standing alone, render the provisions of the Dispute Resolution Provision reasonably certain.

Indeed, just as a provision may be an agreement to arbitrate despite the absence of the label "arbitration," the presence of the label "arbitration" does not mean that a provision is an agreement to arbitrate. (*Elliott v. Ten Eyck Partnership v. City of Long*

Beach (1997) 57 Cal.App.4th 495, 503 ["[T]he fact that a procedure is labeled as 'arbitration' does not mean that it is"]; see, e.g., *City of Shasta Lake v. County of Shasta* (1999) 75 Cal.App.4th 1, 11 ["Despite the fact the parties labeled their proceeding an arbitration, we treat it as a temporary judge proceeding."]; *National Union Fire Ins. Co. v. Nationwide Ins. Co.* (1999) 69 Cal.App.4th 709, 715 ["While the form of the proceedings was denominated an arbitration, its substance was a reference."].) Rather, "[t]he law aspires to respect substance over formalism and nomenclature." (*Shasta*, at p. 11; *Heenan v. Sobati* (2002) 96 Cal.App.4th 995, 1103 ["[N]omenclature is not controlling"].) And here, the substance of the Dispute Resolution Provision (what little there is) does not mandate the core arbitral attribute of finality. Thus, we decline to find, based on a single reference to "arbitration" (outside the Dispute Resolution Provision) and a citation to a nonexistent contract provision, that the Dispute Resolution Provision bears the substance of an agreement to arbitrate.

Finally, Welk contends we must construe ambiguities in favor of the existence of an agreement to arbitrate, given the strong state and federal policies favoring arbitration. We disagree. "While it is true that under the FAA [and state law], ' "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" ' [citations], that policy does not come into effect until a court has concluded that under state contract law, the parties entered into an agreement to arbitrate." (*Lopez v. Charles Schwab & Co., Inc.* (2004) 118 Cal.App.4th 1224, 1229; *Thompson v. Toll Dublin, LLC* (2008) 165 Cal.App.4th 1360, 1370 ["The strong policy in favor of arbitration may not be used to permit a party to enforce provisions of an arbitration agreement that, as here,

either do not exist or were so poorly drafted that another party cannot be presumed to have agreed to them."].) This stems from "the first principle that underscores all of our arbitration decisions: Arbitration is strictly 'a matter of consent,' [citation], and thus 'is a way to resolve those disputes—*but only those disputes*—that the parties have agreed to submit to arbitration.' " (*Granite Rock Co. v. International Brotherhood of Teamsters* (2010) 561 U.S. 287, 299.) Thus, public policy does not alleviate Welk of its predicate burden of proving that the parties entered into an arbitration agreement.[5]

In sum, Welk has not established that the Dispute Resolution Provision is an agreement to arbitrate. Therefore, the trial court properly denied Welk's petition to compel arbitration, to the extent it was based on the Dispute Resolution Provision.[6]

3. *Implied Agreement to Arbitrate*

Welk also contends that regardless of whether the Dispute Resolution Provision is an express agreement to arbitrate, Plaintiffs participated in the JAMS arbitration that Welk had initiated against them and, therefore, entered into an implied-in-fact contract to arbitrate the parties' disputes. In particular, Welk contends that Plaintiffs impliedly

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5 Welk cites *Erickson v. Aetna Health Plans of Cal., Inc.* (1999) 71 Cal.App.4th 646 for the proposition that the presumption of arbitrability applies to the threshold question of whether an agreement to arbitrate exists. *Erickson* does not support Welk's position. In *Erickson*, "there [was] no dispute that the parties had a valid agreement which contained a clause providing for arbitration of disputes. The only question concern[ed] the proper *construction* of that clause, i.e., whether it require[d] arbitration or merely [made] it available at the option of the plan member." (*Id.* at p. 656.)

6 Because the Dispute Resolution Provision is not an agreement to arbitrate, we need not address whether it is unconscionable.

agreed to arbitrate when they requested that JAMS determine the rules governing the arbitration, answered Welk's arbitration demand, and filed counterclaims against Welk.

"A contract is either express or implied. [Citation.] The terms of an express contract are stated in words. [Citation.] The existence and terms of an implied contract are manifested by conduct. [Citation.] The distinction reflects no difference in legal effect but merely in the mode of manifesting assent. [Citation.] Accordingly, a contract implied in fact 'consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words.' " (*Retired Employees Assn. of Orange County, Inc. v. County of Orange* (2011) 52 Cal.4th 1171, 1178.)

"Applying these principles, parties may expressly agree to arbitrate: (1) in a contract signed before [a] dispute arises, although they always retain the power to mutually broaden or narrow the scope of their earlier agreement [citations]; or (2) in a binding stipulation to arbitrate entered into after a dispute has arisen." (*Douglass v. Serenivision* (2018) 20 Cal.App.5th 376, 387 (*Douglass*).) Alternatively, parties may enter into an implied agreement to arbitrate through their conduct, such as when they invoke or participate in arbitration proceedings without raising a timely objection. (*Ibid.*; *Benaroya v. Willis* (2018) 23 Cal.App.5th 462, 474; see also *Nghiem v. NEC Electronic,*

Inc. (9th Cir. 1994) 25 F.3d 1437, 1440 [" '[A]n agreement to arbitrate an issue need not be express; . . . it may be implied from the conduct of the parties.' "].)[7]

Nevertheless, we must remain mindful that arbitration "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." (*Cronus Investments, Inc. v. Concierge Services* (2005) 35 Cal.4th 376, 384-385.) Further, the parties to an agreement to arbitrate can, and typically do, agree upon the rules that will govern in the arbitration before the initiation of the arbitral proceedings. (*Id.* at p. 385 [" 'Just as [parties] may limit by contract the issues which they will arbitrate [citation], so too may they specify by contract the rules under which the arbitration will be conducted.' "]; *Glaser, Weil, Fink, Jacobs & Shapiro, LLP v. Goff* (2011) 194 Cal.App.4th 423, 452 ["In determining the scope of the parties' agreement, such agreement may include the rules under which the parties agreed to arbitrate."]; see also *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. 662, 683 ["[P]arties may agree to limit the issues they choose to arbitrate, [citation], and may agree on rules under which any arbitration will proceed"].)

With these principles in mind, we are of the opinion that Plaintiffs' conduct did not manifest an assent to commit Plaintiffs' disputes with Welk to an arbitral form. In their initial filing with the arbitrator, and repeatedly thereafter, Plaintiffs objected to

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7 Similarly, parties that arbitrate up to the point of submitting a disputed issue for a decision, without having asserted a timely objection, may waive or be estopped from asserting objections regarding the arbitrator's authority. (*Cabrera v. Plager* (1987) 195 Cal.App.3d 606, 613, fn.8; *Fidelity & Casualty Co. of N.Y. v. Dennis* (1964) 229 Cal.App.2d 541, 543-544.)

proceeding in any arbitration governed by non-consumer arbitration rules. Further, although Plaintiffs filed an answer and an assertion of counterclaims in arbitration, they expressly and contemporaneously asserted that the "denial and counterclaim[s] [were] intended only to protect [Plaintiffs'] rights under JAMS rules and [were] not intended to waive any objection to proceeding with [the] matter if it [remained] classified as a non-consumer arbitration." Plaintiffs' protective filings, which specifically noted their objections, do not evince an intent to proceed in arbitration. (See *International Film Investors v. Arbitration Tribunal of Directors Guild* (1984) 152 Cal.App.3d 699, 706 ["There is no risk that the jurisdictional issue will be waived by participation in the arbitration as long as the jurisdictional objection is raised prior to participation."].)

Welk contends that Plaintiffs availed themselves of the arbitrator's authority, thereby consenting to arbitration, when they requested that JAMS designate the proceeding a consumer arbitration. On a related note, Welk directs us to several authorities indicating that a party may not unconditionally request that an arbitrator resolve a disputed issue and then, upon an adverse determination, litigate the same question in another proceeding. (See *Application of O'Malley* (1957) 48 Cal.2d 107, 110; *University of S.F. Faculty Assn. v. Univ. of S.F.* (1983) 142 Cal.App.3d 942, 954 ["A claimant may not voluntarily submit his claim to arbitration, await the outcome, and if the decision is unfavorable, challenge the authority of the arbitrator to act."].) These arguments and authorities do not alter our conclusion.

While it is true that a party may not unconditionally submit a dispute to arbitration and then seek adjudication of that dispute elsewhere upon an adverse determination, see

Application of O'Malley, *supra*, 48 Cal.2d at p. 110, that is not what occurred here. Rather, as discussed *ante*, Plaintiffs registered their objection to proceeding in a non-consumer arbitration and conditioned their participation on a consumer designation. "[P]arties may make their promises conditional on the occurrence of a condition precedent [citation], including their consent to arbitration." (*Douglass*, *supra*, 20 Cal.App.5th at p. 391.)

Moreover, the arbitrator in this case (Judge Brisco) never made a ruling adverse to Plaintiffs. Rather, JAMS's National Arbitration Committee made the non-consumer designation determination as part of its "administrative review" of the case. That determination dictated which rules would apply to the upcoming arbitration proceeding, a matter that, as discussed *ante*, parties typically decide upon *before* proceeding to arbitration as part of their agreement to arbitrate. Further, as Welk itself concedes, the Committee's designation was merely a "preliminary determination," which was "not final" and would have been subject to later revision by the arbitrator had the arbitration proceeded to the point at which the arbitrator became involved. Rather than proceeding to that point, Plaintiffs declined to pay the initial retainer fee for the arbitrator and filed suit in superior court instead. We decline to find that Plaintiffs' request for a preliminary consumer designation, standing alone, evinces an intent to arbitrate.

For these reasons and others, this case is not "nearly identical" to *Douglass*, a recent Court of Appeal decision on which Welk relies. In *Douglass*, one party to a failed advertising agreement filed an arbitration demand against the other party and its agent. (*Douglass*, *supra*, 20 Cal.App.5th at p. 381.) The agent answered the demand without

asserting any objection to the arbitration. (*Id.* at pp. 381-382.) Five months later, he appeared at the preliminary hearing before the arbitrator and stated that he was "voluntarily" appearing and submitted "to the jurisdiction" of the arbitrator. (*Id.* at p. 382.) Two months after that, however, he informed the petitioner he would not continue to participate in the arbitration if the petitioner did not post a bond covering the cost of attorney's fees that the agent might collect if he prevailed. (*Ibid.*) Finally, another three months later—on the proverbial eve of an evidentiary hearing—the agent informed the arbitrator his participation in the arbitration was contingent upon the posting of a bond. (*Ibid.*) The arbitrator construed this as a request to require the posting of a bond, which he denied. (*Ibid.*) Thereafter, the agent terminated his appearance and the arbitrator ruled in the petitioner's favor, finding that the agent had consented to the arbitrator deciding the issue of arbitrability and the petitioner had prevailed on the merits. (*Ibid.*)

On appeal from a superior court order confirming the arbitration decision, the *Douglass* court concluded that the agent, through his conduct, had consented to an implied-in-fact agreement for the arbitrator to decide the issue of arbitrability. (*Douglass*, *supra*, 20 Cal.App.5th at pp. 388-389.) The agent argued, among other things, that he did not consent to having the arbitrator decide the question of arbitrability because his consent was conditioned on the petitioner's posting of a bond, a condition that was never satisfied. (*Id.* at p. 391.) However, the *Douglass* court rejected this argument on grounds that the agent did not relay this condition to the petitioner until seven months after answering the arbitration demand, or to the arbitrator until nearly a year after the filing of the arbitration demand. (*Ibid.*) As the court explained, the agent's "notice of the

conditional nature of his participation did not occur until his conduct had already established his unconditional consent to have the arbitrator decide the question of arbitrability." (*Ibid.*) In short, it was a case of "too little, too late." (*Ibid.*)

Douglass bears little resemblance to this action. Unlike the agent in *Douglass*, 20 Cal.App.5th 376, who arbitrated for nearly a full year before notifying the arbitrator about his purported condition of participation, Plaintiffs immediately objected to proceeding with the arbitration and interposed a condition qualifying their participation in the arbitration. Plaintiffs reiterated these objections and conditions in their answer, which the agent in *Douglass* did not do. And Plaintiffs, unlike the agent in *Douglass*, never appeared at preliminary hearings and informed the arbitrator that they were "voluntarily" appearing at the arbitration and submitting to the arbitral forum. Thus, Plaintiffs did not unconditionally consent to arbitration in the same manner as the agent in *Douglass*.

For all these reasons, we conclude that Plaintiffs did not enter into an implied-in-fact agreement to arbitrate their disputes with Welk. Because Plaintiffs neither entered into an express or implied agreement to arbitrate, the trial court properly denied Welk's petition to compel arbitration.

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

GUERRERO, J.